Midland Investments (KSM) Limited v Prime Bank Limited & 2 others (Commercial Case E399 of 2020) [2023] KEHC 3128 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E399 OF 2020

DAS MAJANJA, J

APRIL 6, 2023

BETWEEN

MIDLAND INVESTMENTS (KSM) LIMITED ..... PLAINTIFF

AND

PRIME BANK LIMITED ..... 1ST DEFENDANT

MIDLAND HAULIERS LIMITED (IN ADMINISTRATION) ... 2ND DEFENDANT

MIDLAND EMPORIUM LIMITED ..... 3RD DEFENDANT

RULING

1. The Plaintiff has moved the court by the application dated January 24, 2022 seeking an order that the court review its order dated March 26, 2021 under the provisions of section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 rule 1 of the *Civil Procedure Rules*. The application is supported by the affidavit of the Plaintiff's director, Jayesh P Kotecha, sworn on January 24, 2022. It is opposed by the 1st and 2nd Defendants' grounds of opposition dated January 26, 2022. The application was canvassed by written submissions.

2. The gravamen of the Plaintiff's case is that in the deposition by Jayesh Kotecha sworn on October 1, 2022, he requested the services of an independent auditor to audit accounts of the 3rd Defendant and the 2nd Defendant with the 1st Defendant ("the Bank") which accounts were filed in court and served on the 1st Defendant on 22nd July 2021. The Plaintiff avers that the Auditors, Mabeya and Associates Auditors, in a report titled, "'Midland Emporium Prima Bank Loan Analysis Report for the 9 year period (January 2004 to August 2012)" ("the Audit Report"), concluded that the 2nd Defendant does not owe the Bank any money and that the 2nd and 3rd Defendants had already overpaid to the Bank the sums borrowed.

3. The Plaintiff therefore contends that in view of the Audit Report and examination of accounts by an independent auditor, there is now sufficient information before the court to review the decision made herein in regard to the accounts supplied by the Bank. It states that the material for preparation of the Audit Report was not before the court despite it exercising due diligence. It states that the issues raised in this matter go as far back as 2003 and it has not been easy to collect all the information for analysis. The Plaintiff states that it is in the interests of justice that the court exercises its residual jurisdiction to prevent fraud on the Plaintiff and avoid injustice in the public interest particularly where it is shown that the Bank has taken advantage of the fiduciary relationship between the parties.

4. The Plaintiff requests the court to examine the accounts and determine the application in light of the new evidence. It contends that the status quo regarding the suit properties should be maintained in order to do justice to the parties and to avoid an injustice to go unresolved by regard to technicalities particularly where the Bank has used its status to unlawfully and without justification take advantage of the Plaintiff.

5. The 1st and 2nd Defendants oppose the application on legal grounds. They contend that the application is res judicata as the court considered the same issue which resulted in the ruling the Plaintiff now seeks to review. That the Plaintiff has not made out a case to warrant review of the orders. It avers that similar orders are sought in other matters involving the parties namely; IN No E008 of 2019 and IP No E012 of 2019 involving the 2nd Defendant.

6. I have considered the application alongside the submissions and the only issue for determination is whether the court should review its order of 26th March 2021 which dismissed the Plaintiff's application dated 1st October 2020. In that application the Plaintiff sought several reliefs including an injunction restraining the 1st Defendant from exercising any rights it statutory power of sale in respect of LR No 209/16791 and Kisumu Municipality/Block 6/22, an order compelling the Defendants jointly and severally to give a proper and accurate account of all securities held by the 1st Defendant on the advances made to the 2nd and 3rd Defendants, an order that the 1st Defendant do give an account of all monies advanced to the 2nd Defendant and the debits and credits made, an order do issue compelling the Defendants to give an account status of the fixed deposit Receipts held by the Guarantors with the 1st Defendant and a proper and accurate account of the application of the proceeds of the fixed deposits by the 1st Defendant.

7. There is no dispute regarding the principles governing the determination of an application for review under section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*. The latter provision states as follows:

   45 Application for review of decree or order

   (1) Any person considering himself aggrieved-

      (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

      (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

8. The Plaintiff's case for review is based on the discovery of new and important material which were not available despite the exercise of due diligence and for sufficient cause. In considering this ground, the Court of Appeal in *Rose Kaiza v Angelo Mpanjuiza* MSA CA Civil Appeal No 225 of 2009 [2009] eKLR cited with approval the following passage in *Mulla on Civil Procedure* (15th Ed) at page 2726:

> Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.

9. As I understand, the Plaintiff's case hinges on the issue of indebtedness. It claims that the Audit Report shows that the 2nd Defendant does not owe the Bank any money and that the parties have already overpaid the money they owe hence the necessity to review the ruling. It is important to appreciate that the issue before the court in relation to the grant of an injunction was whether the Plaintiff has made out a prima facie case with a probability of success. One of the issue the court had to deal with was whether the statutory power of sale had arisen in light of the fact the Plaintiff had denied its indebtedness. I dealt with the issue of indebtedness in the ruling as follows:

> Since there is no dispute that the Plaintiff executed the Guarantee and Charge in favour of the Bank to secure facilities granted to the 2nd Defendant, it follows that the Bank has a chargee's interest in the suit properties. Indebtedness is a condition precedent for the Bank to call in the guarantee and exercise its statutory power of sale. In this case, there is an express admission in Milimani IP E012 of 2019 in the deposition by Jayesh Kotecha, sworn on May 2, 2019, that the 2nd Defendant is indebted to an amount of Kes 610,835,497.29 to various creditors and that, "it is also indebted to Prime Bank Limited (Secured Creditor) for a Disputed outstanding Loan of Kshs 522,236,743.00 anchored upon various Charge Instruments and registered in favour of the Secured Creditor." As I understand, the Plaintiff's disputes the amount due on the basis of interest and penalties charged on the account and the failure to account for some fixed deposits. I hold that any complaint based on these issues would only affect the level of indebtedness and not the fact of indebtedness. Further, at no time during the history of the relationship did the Plaintiff complain about interest and penalties as it continued to approve renewal, variations and restructuring of facilities by executing the Letters of Offer.

10. First and as regards the element of new evidence, I do not consider the Audit Report new evidence. It is a compilation of material that was always available to the Plaintiff. What is new is the opinion of the Auditors who have examined the evidence or facts available. While I doubt that the primary evidence comprising statement of accounts, evidence of payment and other documents which are kept in the normal course of business are new evidence, I am prepared to accept that the evidence supporting the Audit Report may be new.

11. However, an applicant seeking review must also establish that the evidence is not only new but is important. I understand the element of importance relates to proof and ability to affect the outcome of the decision sought to be reviewed thus the material must not only be relevant but be capable of affecting the outcome. I am guided in this conclusion by the decision of the Supreme Court in *Tom*

Martins Kibisu v Republic SCOK Petition No 3 of 2014 [2014] eKLR where it was dealing with review of a conviction after a convict has exhausted all appeals. It observed as follows:

> (42) We are in agreement with the Court of Appeal that under Article 50(6), "new evidence" means "evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person.

12. In this case, there is a clear and unequivocal admission of indebtedness by Mr Kotecha on record. He now seeks to recant that position by producing an Audit Report. The report is the evidence and position of one party, the Bank has its own position on the matter. This means the issue of the debt will remain disputed as the court would have to consider and weight the position exerted by either side. The court, at an interlocutory stage, cannot determine issues with finality as was held by Ringera J, in *Martha Khayanga Simiyu v Housing Finance Company of Kenya and Others* ML HCC No 937 of 2001 (UR) cited by the Plaintiff's counsel where the court observed that:

> In answering that question the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or law at the interlocutory stage particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here.

13. The same position was reiterated by the Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR as follows:

> We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

14. I hold that the admission and consideration of the Audit Report alongside the other evidence in particular the admission of indebtedness on record would yield the same result. The debt would still remain disputed. As I stated in my ruling:

> It is now settled law that a chargee cannot be restrained from exercising its statutory power of sale merely on the basis of disputed accounts or interest (see Mrao Limited v First American Bank of Kenya Limited and 2 Others (Supra) and Joseph Okoth Waudi v National Bank of Kenya CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR). The Bank cannot also be restrained from calling for the repayment of the loans from the Plaintiff as a guarantor. In the light of the foregoing, I find that the Plaintiff has not demonstrated how the Bank has

violated or infringed on its rights in relation to the suit properties. It has failed to establish a prima facie case with a probability of success.

15. Finally, by presenting the Audit Report and arguing that the 2nd Defendant does not owe the Bank any money and that the 2nd and 3rd Defendants have over paid the money they borrowed, the Plaintiff seems to be changing the tenor of its case as pleaded. Its case, as pleaded was that the Bank never granted any financial facilities to the 2nd Defendant and that it did not disburse any loan, overdraft facility or any amount to the 2nd Defendant which the Plaintiff could guarantee. It argued that the Guarantee and Charge created in favour of the Bank were therefore null and void for want of consideration. It also impugns the transfer of the 3rd Defendant's indebtedness by the Bank to the 2nd Defendant without its approval or consent and that the Plaintiff, 2nd and 3rd Defendants are distinct legal entities, each with its shareholders and directors, in line with the hallowed decision of *Salomon v Salomon & Co., Limited* [1897] AC 22 hence and as a result of the acts complained of, it is discharged from any liability as a guarantor.

16. Unless the Plaintiff amends its Plaint to reflect its new found position that it is not indebted to the Bank, the admission of the Audit Report for purposes of section 80 of the *Civil Procedure Act* and Order 40 rule 1 of the *Civil Procedure Rules* is not "important" hence the application for review must fail.

17. For the reasons I have set out, the application dated January 24, 2022 is now dismissed with costs to the 1st and 2nd Defendants.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mogeni instructed by Mogeni and Company Advocates for the Plaintiff.

Mr Mwangi instructed by Machari-Mwangi and Njeru Advocates and for the 1st and 2nd Defendants.